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ALEXANDER L. STEVAS,
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No. 83-951

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

DONALD E. PERCY, et al.,

Petitioners,

v.

GERALDINE BUCKHANON, et al.,

Respondents.

SEPARATE APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (VOLUME III)

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Exhibit A

(Buckhanon v. Percy,
C.A. 81-C-1601, 1/14/82)

Explanation of Program Changes

THIS EXPLANATION AND THE NOTICE OF DECISION LETTER MUST BE READ TOGETHER AS ONE DOCUMENT. READ BOTH CAREFULLY.

The federal Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35) signed into law by President Reagan on August 13, 1981, contains changes in the Aid to Families with Dependent Children (AFDC), Food Stamp and Medical Assistance Programs. Wisconsin is required to comply with the federal changes in these programs. Chapter 93, State Laws of 1981, made these changes in Wisconsin's law. The program changes which result from the above revisions in State or

Federal laws are identified in Section 1-7 of this Explanation of Program Changes.

Many changes in the AFDC and Medical Assistance program will change your grant amount or program eligibility status.

We have provided in Section 9 of this Explanation of Program Changes a description of your appeal rights and how to file your appeal.

With this Explanation of Program Changes, you have also received an individual Notice of Decision letter which identifies the reason(s) you are no longer eligible for AFDC or Medical Assistance or the reason(s) your benefits are being reduced.

If you wish to know the exact figures used in computing the change in your

grant, or if you need further clarification of the reasons for the change, call your case aide at the phone number shown on your Notice of Decision letter.

Below is an example of how AFDC grant calculations have changed for persons with earned income.

Present (12/81)	New (1/82)
Gross income	Gross income
-Minus "$30 and 1/3" disregard as an incentive to work	-Minus up to $75 See Section 2 of this Explanation
-Minus actual work related expenses	-Minus up to $160 for child care See Section 3

-Minus actual child care up to agency maximums	-Minus "$30 and 1/3" disregard See Section 4
+Plus unearned income	+Unearned income
=Budgetable Income	=Budgetable Income
AFDC Payment Allowance	AFDC Payment Allowance
-Minus Budgetable Income	-Minus Budgetable Income
=AFDC Grant	=AFDC Grant

Section 3

Dependent Care (e.g. Child Care)

If you were employed, you may have had all or part of the cost of care for a dependent child disregarded from your earned income.

Effective January 1, 1982, under Section 49.19(5)(a)3., Wis. Statutes if you work full-time (30 hours or more per week), no more than $160 per month for care of each dependent child may be disregarded from your earned income. The child needing care while you work must live in your home and also receive AFDC payments. If you work less than full-time (less than 30 hours per week), no more than $120 per month for care for each dependent child may be deducted from your earned income.

Your AFDC grant may be reduced due to the dependent care deduction limit. If a reduction occurs, your Notice of Decision will contain Reason C listed in Section 8 of this Explanation document.

If you become ineligible as a result of the dependent care limit, your Notice of

Decision will contain Reason A listed in Section 8 of this Explanation document.

Effective January 1, 1981, under Sections 49.46(1)(a)1. and 49.47(4), Wis. Statutes, and 42 CFR 435.700-.711 and 42 CFR 435.831, and the AFDC limits on dependent care costs are required for Medical Assistance applicants and recipients. If your allowable dependent care costs are reduced because of the new dependent care limits, you may be ineligible for Medical Assistance benefits. If you are ineligible for Medical Assistance for this reason, your Notice of Decision will contain Reason B listed in Section 8 of this Explanation document.

Section 4

"$30 and 1/3" Earned Income Disregard

In the past, if you worked we disregarded (did not count) the first $30, and 1/3 of

the remainder, of your GROSS earned income (earnings before taxes and other deductions).

Effective January 1, 1982, under Section 49.19(5)(a)4., Wis. Statutes, we subtract the "$30 and 1/3" from your NET earned income (gross income minus deductions). The net earned income is the money left after subtracting work related expenses and dependent care deductions from your gross earned income. This change in calculation of the "$30 and 1/3" earned income disregard will result in a smaller amount of money being disregarded.

If your AFDC grant is reduced because of a change in the "$30 and 1/3" disregard, your Notice of Decision will contain Reason H listed in Section 8 of this Explanation document.

If you are no longer eligible for AFDC because of the change in the "$30 and 1/3" disregard, your Notice of Decision will contain Reason A listed in Section 8 of this Explanation document.

Section 1

Gross Income Test

Effective January 1, 1982, under Section 69.19(4)(es), Wis. Statutes, you are no longer eligible for AFDC if your family's gross monthly income (total monthly income prior to any deductions) exceeds 150% of the AFDC need standard for your size family. The AFDC need standard used in determining your AFDC eligibility is found in Section 49.19(11)(a),Wis. Statutes. When looking at your gross income, we will not count Supplemental Security Income Program (SSI) payments, payments made under the low income Energy Assistance Program, Food Stamps and other

benefits when federal law says that the benefit may not be counted as income for a welfare program.

This table shows the maximum gross monthly income limits for different family sizes according to the area of the state in which you live.

MAXIMUM MONTHLY GROSS INCOME LIMIT BY FAMILY SIZE AND AREA

Family Size	1	2	3	4	5	6
Area I	$399	708	834	993	1,142	1,233
Area II	$387	687	809	963	1,107	1,196

Family Size	7	8	9	10
Area I	$1,337	1,418	1,485	1,520
Area II	1,296	1,376	1,440	1,475

If your case is closed because gross monthly income exceeds the new applicable limit explained above, your Notice of Decision will contain Reason A or C as

shown in Section 8 of this Explanation document.

Section 2

$75 Earned Income Disregard

Effective January 1, 1982, under Section 49.19(5)(a)2, Wis. Statutes, there is now a limit to the amount of your earned income which may be disregarded (not counted) as work related expenses. If you work full-time (30 hours or more per week), the earned income exemption will be $75. If you work less than full-time (less than 30 hours per week), the earned income exemption will be 18% of your gross income OR $75, whichever is less.

If your earned income disregard was more than $75 last month or more than 18% of income if you worked less than 30 hours, it will be reduced. This reduction may

cause your AFDC grant to be less or you may not be eligible for AFDC.

If your AFDC grant is reduced because of the $75 limit on the earned income disregard, your Notice of Decision will contain Reason D listed in Section 8 of this Explanation document. If you are ineligible for AFDC because of this change, your Notice of Decision will contain Reason A listed in Section 8 of this Explanation document.

Section 5

Asset Limit

Effective January 1, 1982, under Sections 49.19(4)(bm), 49.46(1)(a)1., and 49.46(1)(e), Wis. Statutes, and 42 CFR 435.700 and 435.711, the value of assets you may have is limited to $1,000. This limit is the same for AFDC and Medical

Assistance recipients who receive AFDC. The asset limit was formerly $1,500.

What we consider as an asset is the same under both the old and new law, except for motor vehicles. Section 49.19(4)(bm), Wis. Statutes, allows you to own any number of motor vehicles. Equity value is the money you would get (after paying what you owe on the vehicle) if you sold the vehicle for what it is worth in the current market. The vehicle which has the greatest equity value will be considered your "first vehicle." The equity value in the "first vehicle" in excess of $1,500 is counted toward the $1,000 asset limit. All equity in other vehicles is counted as an asset. Your case aide can tell you what the equity value of your motor vehicle is.

If your case is closed because your assets exceed the $1,000 limit, your Notice of Decision will contain Reason E listed in Section 8 of this Explanation document.

Section 6

Aid for Pregnant Women

Effective January 1, 1982, under Section 49.19(4)(g), Wis. Statutes, pregnant women who meet other AFDC eligibility criteria may be eligible for AFDC beginning in the seventh month of pregnancy. If found eligible for AFDC, pregnant women with no other children would receive a single person grant. No AFDC benefits can be paid to meet the needs of unborn children. The statute provides for payment of an additional $60 monthly allowance to pregnant women beginning in the seventh month of pregnancy and

continuing through the month of the child's birth.

If you have no children and you are married, and your spouse has been receiving AFDC, then he will no longer be eligible for AFDC because there is not a dependent child in your home. If your AFDC grant is reduced for this reason, your Notice of Decision will contain Reason F listed in Section 8 of this Explanation document.

You may be in the 7th, 8th or 9th month of pregnancy and be receiving an AFDC payment for the next size larger AFDC group than the actual size of your family. If so, your new AFDC payment will be changed to the AFDC payment for your actual family size not counting the unborn child, plus $60.

If your AFDC grant is reduced for this reason, your Notice of Decision will contain Reason J or L listed in Section 8 of this Explanation document.

Effective January 1, 1982, if you are pregnant you may be found ineligible for AFDC, (under Section 49.19(4)(g) Wis. Statute) or Medical Assistance (under Sections 49.46(1)(a)1., or 49.47(4), Wis. Statutes) for one of the following reasons:

1. You are in the first six months of pregnancy. If you are ineligible for AFDC for this reason, your Notice of Decision will contain Reason I listed in Section 8 of this Explanation document.

2. You are married and do not meet the AFDC eligibility criteria for the

Unemployed Parents Program or either you or your spouse is not incapacitated. If you are ineligible for Medical Assistance for this reason, your Notice of Decision will contain Reason M or N listed in Section 8 of this Explanation document.

3. If you are the father of an unborn child, you will no longer be eligible for Medical Assistance. Your Notice of Decision will contain Reason M listed in Section 8 of this Explanation document.

Section 7

Some 18-21 Year Olds Are No Longer Eligible for Medical Assistance

Effective January 1, 1982, under Section 49.47(4)(a)1. and 2., Wis. Statutes, and 42 CFR 435.308, you may no longer be eligible for Medical Assistance.

Formerly, you were eligible for Medical Assistance if your income was low enough and you were between 18 and 21 years of age. Now, even though your income is low enough, you are no longer automatically eligible for Medical Assistance simply because you are between 18-21 years of age. To maintain your Medical Assistance eligibility, you will have to meet the income and asset limitations and be one of the following:

a. Blind

b. Disabled

c. Pregnant and otherwise eligible for AFDC, but have not reached the 7th month of your pregnancy.

d. Included in an AFDC grant.

Section 8

DESCRIPTION OF "REASONS" CONTAINED IN YOUR NOTICE OF DECISION LETTER.

This Section lists the brief "reason" statement(s) that are contained in Notice

of Decision letters for a reduction in benefits or a finding of ineligibility. Refer to Sections 1-7 of this Explanation of Program Changes document for a fuller explanation of each change.

A. Income is $_____ above limit allowable for eligibility. 49.19(5)(a)* Stats, 45 CFR** 233.20(a)(3)

B. Income is $_____ above limit allowable for eligibility. 49.46(1)(a)* or 49.47(4)(c) Stats., 42 CFR 435.700 and 435.711

C. Income exceeds the gross income limit. 49.19(4)(es)*, Stats., 45 CFR 233.20(a)(3)(xiii)

D. Allowable work related expenses are less. 49.19(5)(a)2.,* Stats., 45 CFR 233.20(a)(ii)

E. Assets are $_____ above limit allowable limit. 49.19(4)(bm)*; 49.46(1)(a)1., Stats.; 45 CFR 233.20(a)(3)

F. There is no eligible child (under 18) in the home. 49.19(1)(a), Stats.

G. Child care costs are less/unneeded. 49.19(5)(a)3.*, Stats.; 45 CFR 233.20(a)(ii)

H. Allowable earned income disregard is less. 49.19(5)(a)4.*, Stats.; 45 CFR 233.20(a)(ii)

I. Pregnancy is not in month 7, 8 or 9. 49.19(4)(g)*; 49.47(4)(a)2.*; 49.46(1)(a)1m*, Stats.

J. Pregnancy allowance has been reduced. Sec. 49.19(4)(g)*, Stats.

K. He/she is 18-21 years old. 49.47(4)*, Stats.

L. The pregnancy allowance no longer applies. Sec. 49.19(4)(g)*, Stats.

M. Is not aged, blind, disabled or under 18. 49.47(4)(a), Stats.

N. No person is determined eligible. 49.19(4)(a), 49.47(4)(a), Stats.

O. A resident in a intermediate care facility, skilled nursing facility or inpatient psychiatric hospital, and under 21 years of age.

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*Wisconsin statutes effective January 1, 1982
**Code of Federal Regulations

If you are no longer eligible for medical assistance because you are 18-21 years of age and are not covered by a-e. above, your Notice of Decision will contain Reason K listed in Section 8 of this Explanation document.

EXPLANATION OF PROGRAM CHANGES.

Please read this sheet carefully, together with your notice of decision letter.

Section 9

RIGHTS TO APPEAL

You have the right to appeal any action taken by this agency. You may appeal in writing, by phone or in person. To appeal by phone or in person, call the number or go to the office shown on your

Notice of Decision letter. Oral hearing requests must be followed by a written request before a hearing will be scheduled. To submit a written request for a fair hearing, send your request to your local agency or to the State Department of Health and Social Services, Office of Administrative Hearings, c/o Division of Economic Assistance, P. O. Box 8913, Madison, WI 53708. You must do this within 45 days of January 1, 1982.

You have the right to a written notice from this agency 10 days in advance of any action we intend to take that will stop or reduce your benefits. If you request a fair hearing during those 10 days, your benefits will not be stopped or reduced at least until the fair hearing decision is made. If the hearing decision orders that your aid be reduced or stopped, you may be required to repay

any excess benefits you received while your appeal was pending. We will be glad to explain how this might apply to your case. Our staff will help you with any request for a fair hearing, or will arrange a conference with you to discuss any agency actions you question. A conference will not affect your right to a fair hearing.

If you or your representative fail to appear, without good cause, at your scheduled hearing, your appeal will be considered abandoned and will be dismissed.

At any fair hearing or conference you may represent yourself or be represented by an attorney, friend, relative or other person of your choice. We cannot pay for an attorney for you, but free legal advice may be available to you. You may

call the phone number on the Notice of Decision letter for more information about this. You can also retain a private attorney at your expense. You may contact the legal referral service in your community if you do not already have an attorney.

If you have trouble understanding or speaking English, you may bring your own interpreter. We cannot pay for this, but free help may be available. You may call the phone number on the Notice of Decision letter for more information.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

GERALDINE BUCKHANON, et al.,

Plaintiffs,

vs. Case No. 81-C-1601

DONALD PERCY, et al.,

Defendants.

MEMORANDUM AND ORDER

On January 14, 1982, the Court issued a preliminary injunction in this action requiring defendants to reinstate, to their December 1981 level, the Aid to Families with Dependent Children ("AFDC") benefits and Medical Assistance ("MA") benefits to those class members of the plaintiff class whose aid was reduced or terminated as a result of seven changes made by the State of Wisconsin in the method used for determining the eligibility for those benefits. These

changes came about as a result of the Omnibus Budget Reconciliation Act ("OBRA") enacted by Congress in August of 1981. The Court ordered the injunction to remain in effect until defendants provided plaintiff class members with adequate notice of the reasons for the proposed reduction or termination of their benefits.

On January 20, 1982, the Court approved notices submitted by the defendants. Defendant mailed the approved notices directly to class members affected by six of the seven OBRA changes. The parties agree that the notices sent to these individuals provided them adequate advance notice of the reasons for the proposed reduction or termination of their benefits.

Due to a programming error, defendants mailed the notice pertaining

to the application of the OBRA 150 percent gross income test to county agency offices rather than directly to those class members affected by the 150 percent gross income test. After discovering the error, defendants directed the county agencies to forward the notices to the individuals affected by the change.

At the hearing held on January 20, 1982, defendants' counsel inquired whether the Court's January 14, 1982 order required the State to reinstate the benefits of plaintiff class members for the month of January. Defendants contended for the first time at that hearing that such an order would violate the Eleventh Amendment. Because the parties had not addressed this issue previously, the Court treated defendants' inquiry and contention as a request for

clarification and ordered the parties to brief the issue. That issue has now been fully briefed and will be resolved in this memorandum and order.

In addition, the Court will resolve at this time defendants' motion to dismiss and defendants' motion to modify the January 14, 1982 injunction.

I. Motion to Dismiss

Defendants' motion to dismiss is based on their contention that this Court is without jurisdiction in this action. Specifically, defendants contend plaintiffs lack the requisite standing to fulfill the "case or controversy" requirement of Article III of the United States Constitution.

When a plaintiff's standing is brought into issue, the relevant inquiry is whether, assuming justiciability of

the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). The individual plaintiffs, on behalf of themselves and the plaintiff class designated by the Court, clearly have met this requirement. They allege they have been injured as a result of defendants' failure to provide them with adequate notice of the reasons for terminating or reducing their benefits. This type of injury can be and, in fact, has been redressed by courts in the Seventh Circuit. See Dilda v. Quern, 612 F.2d 1055 (7th Cir.) cert. denied, 447 U.S. 935 (1980); Banks v. Trainor, 525 F.2d 837 (7th Cir. 1975), cert. denied, 424 U.S. 978 (1976); Vargas v. Trainor, 508

F.2d 485 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975).

Plaintiffs contend the two welfare rights groups have standing because they are "in the business" of advising and representing public assistance applicants and recipients. Plaintiffs further contend the organization plaintiffs have been impeded in fulfilling their function as a result of the inadequate notice provided by defendants. Plaintiffs also argue that Dane County Welfare Rights Alliance has standing because it is suing on behalf of its members.

In Valley Forge Christian College v. American United for Separation of Church and State, ____ U.S. ____, 50 U.S.L.W. 4103 (January 12, 1982), an organization dedicated to the separation of church and state challenged the

transfer of government property at a discounted rate to a church-related college. In its decision, the Supreme Court undertook a review of its earlier decisions on the issue of standing. The Court stated:

> The Art. III aspect of standing also reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order. The federal courts have abjured appeals to their authority which would convert the judicial process into "no more than a vehicle for the vindication of the value interests of concerned bystanders." United States v. SCRAP, 412 U.S. 669, 687 (1973). Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of juris-prudential understanding, the concept of "standing" would be quite unnecessary. But the "cases and controversies" language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums. As we said in Sierra Club v. Morton, 405 U.S. 727, 740 (1972):

> "The requirement that a party seeking review must allege facts showing that he is himself adversely affected . . . does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." Id. at 4105.

Having considered plaintiffs' arguments in light of the Valley Forge decision, the Court concludes that the organization plaintiffs fall into the category of concerned bystanders. Although the members of the organizations have been affected by the defendants' actions, the organizations themselves do not have a direct stake in the outcome of this litigation.

Based on the foregoing, the Court grants defendants' motion to dismiss the claims of plaintiffs Dane

County Welfare Rights Alliance and Community Advocates and denies defendants' motion to dismiss the claims of the four individuals and class members.

II. Eleventh Amendment Issue

In its January 14, 1982 order, the Court required defendants "to reinstate to their original level the AFDC, MA and FS benefits to those members of the plaintiff class whose aid was reduced or terminated as a result of one of seven specified OBRA provisions." The question the Court must now determine is whether the defendants were obligated to pay January benefits at the December 1981 level, or whether an order to that effect would constitute retroactive relief against the State of Wisconsin in violation of the Eleventh Amendment.

Plaintiffs contend payment of January benefits at their previous level would not violate the Eleventh Amendment. In support of their position, they rely primarily on Turner v. Walsh, 435 F. Supp. 707, aff'd, 574 F.2d 456 (8th Cir. 1978); and Porter v. Schweiker, Civil Case No. 4-81-651 (D. Minn. Oct. 29, 1981).

In Turner, the Eighth Circuit Court of Appeals adopted the decision of the district court and affirmed its ruling that a state's failure to provide adequate written notice of planned AFDC reductions required reinstatment of plaintiffs' benefits for July, the month in which the order was made. In ordering defendants to make the July payments at June levels, the district court stated:

> Although the effective date of implementation of §208.150, R.D.Mo. 1977 [the new computation method] was July 1, 1977,

> and the members of plaintiffs' class may have been physically removed from the computer rolls with respect to their June benefits, the evidence indicates that welfare benefits are payable any time within the month; thus, if ordered to do so within the month of July, defendants' action to restore benefits to their June levels would constitute a continuation of those benefits, rather than a retroactive grant. See Edelman v. Jordan, 415 U.S. 651 (1974); Milliken v. Bradley, 443 U.S. 267 (1977). Id. at 714-715, footnote 9.

A federal district court in Minnesota reached a similar result in Porter. In that action, plaintiffs brought suit to challenge the October 1, 1981 reductions in plaintiffs' AFDC grant for a recoupment procedure the State of Minnesota claimed was mandated by OBRA provisions. On October 29, 1981, the Court ruled in favor of the plaintiffs and ordered the State to reinstate plaintiffs' AFDC benefits for October 1981 at their September 1981 levels. In

addressing the question whether its order violated the Eleventh Amendment, the court stated:

> this case, at this stage of the proceedings does not fall within the prohibitive confines of the Eleventh Amendment. October AFDC grants are supposed to meet the needs of the recipient's family which arise in October. Although AFDC grants are generally paid on the first of the month, they may be paid or supplemented at any time during the month. Thus, an order requiring reinstatement of October benefits to be completed in October does not provide retroactive relief from the State's Treasury contrary to Quern, Edelman, and the Eleventh Amendment. See Turner v. Walsh, 435 F. Supp. 707, 714 fn. 9 (W.D. Mo. 1977), aff'd 574 F.2d. 456 (8th Cir. 1978). Such a reinstatement is merely a continuance of benefits and has no retroactive effect. 435 F. Supp. at 715.

Defendants contend Turner is distinguishable from the case at bar because Turner involved inadequate information regarding hearing rights

rather than inadequate notice. They also contend the Turner analysis may be questionable because that decision was decided prior to Quern v. Jordan, 440 U.S. 332 (1979).

Defendants also contend Porter offers little guidance to the Court because it was not a notice case but rather dealt with grants which were proven incorrect. Defendants further contend Porter should not be followed because the defendants in that action appealed the district court's decision.

The Court finds defendants' attempts to distinguish Turner and Porter unpersuasive. That the underlying violations in those cases were not precisely the same as the violation in this action does not affect their relevance. Whether notices to public assistance recipients are inadequate

because the reasons given are incomplete or because the explanation of appeal rights is inaccurate does not affect the ultimate conclusion that notice is invalid if it is inadequate. Furthermore, that Turner was decided prior to Quern does not affect its relevance since it is the Supreme Court's decision in Edelman which differentiates prospective from retroactive relief. Finally, because the defendants in Porter have abandoned their appeal, defendants' contention that the appeal in that action affects its viability is without merit.

This Court agrees with the Turner and Porter courts that an interpretation of the January 14, 1982 order requiring continuation of January benefits at December levels would not constitute a retroactive grant, to the extent state law permits payment of

benefits at any time during a month. Therefore, the Court must look to Wisconsin law to determine whether AFDC and MA payments can be made at any time during a month or whether they must be made prior to the fourteenth of the month, i.e., the date of this Court's original order.

Under Wisconsin law, AFDC payments are to be made monthly, except that the director of the county agency may, in his discretion for the purpose of protecting the public, direct that the monthly allowance be made in two or more installments. Wis. Stat. § 49.19(3)(b). Section PW-PA 20.11(3) of the Wisconsin Administrative Code sets forth the manner by which payments under the lump sum and installment plans are to be made. That section also provides that supplemental payments to meet increased

budgetary needs and payments correcting prior underpayments may be made at any time during a month. In addition, under section PW-PA 20(11)(4), adjustments made after grants of aid are reinstated after suspension, adjustments upon order of the state department of health and social services, division of family services, made in accordance with Wis. Stat. § 49.50(8), and adjustments engendered by courts' decisions which change the regulation upon which the case was denied, discontinued or improperly computed are not precluded.

Although neither the Wisconsin Statutes nor the Administrative Code provisions specifically state that a judicially ordered adjustment to benefits in an action such as this constitutes a continuation of benefits rather than a retroactive grant, the fact that the

Wisconsin legislature permits payments throughout a month for legitimate reasons such as underpayments and miscalculated payments leads this Court to conclude that an order requiring continuation of benefits for the month of January would constitute a continuation of benefits rather than a retroactive grant in violation of the Eleventh Amendment. Therefore, pursuant to the Court's memorandum and order of January 14, 1982, defendants must pay January 1982 AFDC benefits to the eligible class plaintiffs at their December 1981 level.

In Wisconsin, MA benefits are not paid directly to the aid recipients. Rather, the recipients are issued Medicaid cards which they present to certified providers of health care services. The payments are later made by the State directly to the providers.

In December of 1981, the computer center which handles the mailing of Medicaid cards to medical assistance recipients did not mail Medicaid cards for January 1982 to 37,844 Medicaid recipients whose aid was to be terminated as a result of the OBRA changes. Because none of these individuals had Medicaid cards, none of them could "bill" the State for medical services rendered in the month of January.

Plaintiffs contend that an order requiring reinstatement of all medical assistance benefits for the month of January 1982 would not violate the Eleventh Amendment because Wis. Stat. § 49.46(1)(b) states that a person shall be considered a recipient of aid for three months prior to the month of application if the proper agency determines eligibility existed during such prior

month. Further, plaintiffs contend, an order requiring payment for all services rendered during the month of January would not be retroactive because, under Section HSS 106.03 of the Wisconsin Administrative Code, a claim may be submitted to the fiscal agent within one year of the date the medical service was provided.

The Court cannot accept plaintiffs' argument that all January medical bills should be paid by the State. The State's obligation to pay for medical services arose at the time the treatments were received. To require the State to make payments for services rendered prior to January 14, 1982 would be tantamount to "'the award of an accrued monetary liability . . .' which represent[s] 'retroactive payments.'" Milliken v. Bradley, 433 U.S. at 289

(quoting from Edelman v. Jordan, 415 U.S. at 663-64).

The Court does, however, agree with plaintiffs that an order requiring the State to pay for medical services received after January 14, 1982 would not violate the Eleventh Amendment. Such relief could hardly constitute "the award of an accrued monetary damage." To the contrary, the State's liability for those services did not become fixed until after the entry of the Court's January 14, 1982 memorandum and order. See, Kimble v. Solomon, 599 F.2d 599 (4th Cir. 1979). Accordingly, pursuant to the Court's order of January 14, 1982, the State is liable for January medical services obtained by eligible plaintiff class members after January 14, 1982.

III. Motion to Modify Injunction

As stated earlier, a programing error resulted in the notice approved by the Court on January 20, 1982 being mailed to the county agency offices, rather than directly to the plaintiffs affected by the 150 percent gross income test.

The State recognizes that its failure to mail these notices directly to the eligible plaintiffs constituted untimely notice. However, because it acted in good faith in attempting to provide adequate and timely notice, the State requests the Court to modify the injunction with respect to the affected plaintiffs by relieving it from reinstating benefits for February 1982. The State suggests that an appropriate alternative remedy would be an order requiring it to send the affected

plaintiffs a notice extending their hearing rights.

Although the Court is sympathetic to the State's plight, it is of the opinion that the requested relief would be contrary to the law. Federal regulations provide that notice must be mailed ten days prior to the effective date. 45 CFR § 205.10(a)(4)(i)(A). Defendants failed to comply with this regulation.

Based on the foregoing, defendants' motion for a modification of the injunction is hereby DENIED.

IV. Summary

In summary,

(1) defendants' motion to dismiss the claims of the two organizational plaintiffs is GRANTED;

(2) defendants' motion to dismiss the claim of the individual class members is DENIED;

(3) pursuant to the Court's order of January 14, 1982, defendants must pay eligible plaintiffs AFDC benefits for January of 1982 at December 1981 benefits;

(4) pursuant to the Court's order of January 14, 1982, defendants must pay for the medical services received by eligible plaintiffs after January 14, 1982; and

(5) defendants' motion for modification of the January 14, 1982 injunction is DENIED.

SO ORDERED this 1st day of June 1982, at Milwaukee, Wisconsin.

/s/ ROBERT W. WARREN
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

GERALDINE BUCKHANON, et al.,

Plaintiffs,

vs. Case No. 81-C-1601

DONALD PERCY, et al.,

Defendants.

DECISION AND ORDER

On January 14, 1982, the Court issued a preliminary injunction in this action requiring defendants to reinstate to their December 1981 level, the Aid to Families with Dependent Children (AFDC) benefits and Medical Assistance (MA) benefits to those class members of the plaintiff class whose aid was reduced or terminated as a result of seven changes made by the State of Wisconsin in the method used for determining eligibility

for those benefits. Those changes came about as a result of the Omnibus Budget Reconciliation Act (OBRA) which Congress enacted in August 1981. The Court ordered the injunction to remain in effect until defendants provided plaintiff class members with adequate notice of the reasons for the proposed reduction or termination of their benefits.

On January 20, 1982, the Court approved notices prepared by the defendants. Defendants mailed the approved notices directly to class members affected by six of the seven OBRA changes. The parties agree that the notices sent to these individuals provided them adequate notice of the reasons for the proposed reduction of termination of their benefits.

Due to a programming error, however, defendants mailed the notice pertaining to the application of the OBRA 150 percent gross income test to county agency officers rather than directly to those class members affected by the 150 percent gross income test. After discovering the error, defendants directed the county agencies to forward the notices to the individuals affected by the changes. By motion, filed February 3, 1982, defendants requested the Court to modify its order of January 14, 1982 with regard to the plaintiff class members affected by the 150 percent gross income test. Defendants requested that they be relieved from reinstating AFDC and/or MA benefits to such persons for February 1982 since defendants had acted in good

faith in attempting to provide adequate and timely notice.

Defendants also requested the Court for clarification of its January 14, 1982 order in regard to the Court's directive to reinstate benefits at original levels. The question presented to the Court was whether the defendants were obligated to pay January 1982 benefits at the December 1981 level, and whether an order to that effect would constitute relief against the State of Wisconsin in violation of the Eleventh Amendment.

In its order of June 1, 1982, the Court resolved the foregoing questions. It held that defendants were required by the Janaury 14, 1982 order to pay eligible plaintiffs AFDC benefits for January 1982 at December 1981 levels and to pay for medical services received by eligible plaintiffs after January 14,

1982. The Court held that the order did not constitute a violation of the Eleventh Amendment. In addition, the Court denied defendants' motion to modify the January 14, 1982 order and held that defendants' failure to provide timely notice to the plaintiff class members affected by the 150 percent gross income test, albeit in good faith, constituted a violation of the notice requirement contained in applicable federal regulations.

On July 1, 1982, defendants filed a notice of appeal with regard to that portion of the Court's June 1, 1982 order which required defendants to pay eligible plaintiffs AFDC benefits for January 1982 at December 1981 levels and to pay for medical services received by eligible plaintiffs after January 14, 1982. Defendants did not appeal that portion of

the Court's June 1 order denying defendants' motion to modify.

On July 13, 1982, defendants filed a motion for stay and motion for stay pending appeal. Defendants request (1) a stay of all orders prohibiting defendants from reducing AFDC and MA payments and (2) a stay pending appeal of the Court's order clarifying the January 14, 1982 order. The grounds for the motion to stay are: (1) that defendants cannot assure the restoration of MA benefits in the form of the actual receipt of a check by each eligible class member until six months to a year have elapsed; and (2) that the issuance of AFDC benefits would interfere with complicated computer conversions now mandated by changes in federal law. As grounds for their motion for a stay pending appeal, defendants assert: (1) that a stay would be in the

public interest; (2) that the state would suffer irreparable financial harm in the absence of a stay and in the event of reversal on appeal; and (3) that the potential harm to plaintiffs caused by a stay would be minimized because the state retains the ability to locate eligible plaintiffs in the event an appeal is unsuccessful. The Court will discuss and resolve these motions separately below.

I. Motion for Stay Pending Appeal

Rule 62(c) of the Federal Rules of Civil Procedure provides that an interlocutory or final judgment in an action for an injunction shall not be stayed pending appeal unless the district court, in its discretion, orders such a stay. The district court should consider four factors in determining whether a stay should be granted:

(1) the likelihood of the appellant's success on the merits of its appeal;

(2) the chance that the appellant will suffer irreparable harm unless the stay is granted;

(3) the degree of harm the appellees will suffer if the stay is granted; and

(4) whether a stay is compatible with the public interest.

Jordan v. Wolke, 463 F. Supp. 641, 642 (E.D. Wis. 1978).

The Court considers these factors below.

A. Appellants' Likelihood of Success on Appeal.

In considering the defendants' likelihood of prevailing on an appeal of the Court's order of June 1, 1982, the Court must consider separately the two aspects of the order which defendants have appealed. One part of the Court's order requires the payment of AFDC benefits for January 1982 at December

1981 benefits. The other part requires payment for medical services received by eligible plaintiffs after January 14, 1982.

With respect to AFDC benefits, the Court concludes that defendants have a reasonable chance of prevailing on appeal. In its order of June 1, 1982, the Court considered whether under Wisconsin law, AFDC payments may be supplemented after initial payments have been made. See Mem. & Order at 7, 8. The Court concluded that, although the Wisconsin Statutes and Administrative Code were silent with regard to adjustment of benefits pursuant to court order, the applicable legislation could be interpreted as allowing for such adjustments. Having so concluded, the Court held that its order of January 14, 1982 required the payment of January 1982

AFDC benefits at December 1981 levels and did not violate the Eleventh Amendment. Mem. & Order at 8. While this Court would still maintain that this conclusion is supported by the applicable Wisconsin legislation and by federal case-law authority, see, e.g., Turner v. Walsh, 435 F. Supp. 707, aff'd, 574 F.2d 456 (8th Cir. 1978), and Porter v. Schweiker, Civil Case No. 4-81-651 (D. Minn. Oct. 29, 1981), it would also opine that there is room for disagreement. What constitutes retroactive relief against a state in violation of the Eleventh Amendment is often a difficult question to resolve. In the context of the instant case, it is one as to which the Seventh Circuit may reach a different answer. Accordingly, the Court concludes that, with respect to that portion of its June 1, 1982 order concerning the payment

of January 1982 AFDC benefits at December 1981 levels, the defendants have a reasonable chance of prevailing on appeal.

The Court takes a different view, however, with regard to that portion of its June 1 order regarding the state's obligation to pay for medical services received by eligible plaintiffs after January 14, 1982. In its order of June 1, 1982, the Court rejected the plaintiffs' argument that all January medical bills should be paid by the State. See Mem. & Order at 9, 10. It concluded that, under the applicable state law, the defendants' obligation to pay for medical services arose at the time the treatments were received. Thus, to require the state to make payments for services rendered prior to January 14, 1982 would be tantamount to "'the award

of an accrued monetary liability ...' which represent[s] 'retroactive payments.'" Milliken v. Bradley, 433 U.S. at 289 (quoting Edelman v. Jordan, 415 U.S. at 663-64). Nonetheless, the Court concluded that its order of January 14, 1982 requires payment for medical services received by eligible plaintiffs after January 14, 1982. The Court reasoned that such relief could hardly be considered an "award of an accrued monetary liability" since the State's liability for those services did not become fixed until after the entry of the Court's order of January 14, 1982. See June 1, 1982 Mem. & Order at 9.

In light of the foregoing reasoning, the Court has little difficulty in concluding that defendants have little likelihood of prevailing on appeal with regard to that portion of the June 1

order which addresses the State's liability to pay for medical services rendered after January 14, 1982. The prospective nature of the relief ordered by the Court in its January 14, 1982 order leaves little room for challenge on Eleventh Amendment grounds.

Moreover, the Court is equally convinced that defendants have little chance of prevailing on appeal with regard to the initial issue presented in this case, i.e., the sufficiency of the original notices sent to benefit recipients. The Court went into great detail in its January 14, 1982 memorandum and order setting forth the deficiencies in the challenged notices. Applying the relevant precedents from the Seventh Circuit, the Court concluded that plaintiffs had demonstrated a reasonable likelihood of success on the merits of

their due process challenge with respect to various portions of the notices. The Court also concluded that plaintiffs had carried their burden with respect to the other prerequisites necessary for the issuance of a preliminary injunction. The Court has little doubt that its decision will be upheld on appeal, particularly in light of the Seventh Circuit's prior rulings in similar cases. See Dilda v. Quern, 612 F.2d 1055 (7th Cir.), cert. denied, 447 U.S. 935 (1980); Banks v. Trainor, 525 F.2d 837 (7th Cir. 1975), cert. denied, 424 U.S. 978 (1976); Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974) cert. denied, 420 U.S. 1008 (1975).

B. Potential Harm to Appellants in the Absence of a Stay.

Defendants have detailed in affidavits the potential financial harm the State of Wisconsin would suffer if a stay is not granted and this Court's decision is reversed on appeal. Defendants are primarily concerned about the unrecoverable costs of complying with this Court's order and with the potential unrecoverable benefits which must be paid pursuant to the Court's order.

Defendants estimate that the Court's clarification order requires the State to pay out over $2,250,000.00 in AFDC benefits. (AFDC & Cost Aff. ¶'s 13-15). In the event of a successful appeal, unrecoverable AFDC benefits and associated collection costs would be approximately $675,000.00. In addition, there would be certain administrative

costs of compliance with this Court's order which would be unrecoverable. Although plaintiffs have pointed out that there is authority under Wisconsin law for the recovery of incorrectly-paid AFDC benefits (see Plaintiff's Brief at 10), the Court does not doubt, in light of the nature of the AFDC program, that substantial amounts of benefits and costs would be unrecoverable.

Defendants estimate that $175,000 in MA benefits must be paid as a result of this Court's clarification order. (MA Aff. ¶'s 9, 14, 15). Total administrative costs of paying such benefits are estimated to be $25,000. (MA Aff. ¶'s 11-13, 28). Plaintiffs concede that there is no recovery mechanism under Wisconsin law for incorrectly-paid MA benefits. See Plaintiffs' Brief at 10. Thus, the total unrecoverable MA payments

and reimbursement costs would be approximately $200,000. Defendants estimate that the procedure for reimbursement of MA benefits will take approximately six months. (MA Aff. ¶ 6.)

C. Potential Harm to Appellees if a Stay is Granted.

As defendants have conceded in their initial brief (p. 6), the Seventh Circuit has indicated that the reduction of welfare benefits can constitute irreparable harm for purposes of injunctive relief. See Banks v. Trainor, 525 F.2d 837, 843 (7th Cir. 1975), cert. denied, 424 U.S. 978 (1976). In the present context, however, the Court must consider the harm to plaintiffs in comparison to that which might be suffered by defendants in the absence of a stay. See Shinholt v. Angle, 90 F.2d

297, 298 (5th Cir. 1937). In the instant case, it is evident that both sides will suffer injury if the other side prevails.

D. The Public Interest.

In arguing that the request for a stay should be denied, plaintiffs point to this Court's order of January 14, 1982 in which it stated that "all citizens benefit when the Constitution is upheld." 533 F. Supp. at 840. As defendants point out in their reply brief, however, granting a stay cannot be equated with denying plaintiffs their constitutional rights. At this stage in the proceedings, the Court is concerned with the public interest as it relates to whether the Court's order should be stayed pending appeal. In examining this issue, the Court must also consider the potential harm to the taxpayers of

Wisconsin in the event defendants are successful on appeal. The Court concludes that there is a strong public interest to be served on each side of the case.

E. Weighing the Factors.

Having considered the four factors noted by the court in Jordan v. Wolke, 463 F. Supp. at 642, the Court must now weigh those factors in deciding whether to stay its order pending appeal. As indicated above, there are substantial harms which could be suffered by either side depending on the outcome of defendants' appeal. Moreover, there is a strong public interest favoring each side. The Court concludes, therefore, that it must look to the first factor, i.e., the reasonable likelihood of success on appeal, to resolve the motion

for a stay pending appeal. As the Court concluded above, defendants do not have a reasonable chance of succeeding on appeal of this Court's order as it relates to the payment of MA benefits. Consequently, the Court will deny defendants' motion to stay that portion of the Court's order. Conversely, because the Court has concluded above that defendants have a reasonable chance of succeeding on appeal with respect to the payment of AFDC benefits, the Court will stay the portion of its order relating to AFDC benefits.

II. Motion for Stay.

In addition to requesting a stay pending appeal, defendants request the Court to exercise its inherent power to stay all other supplemental benefit payments required by the Court's

preliminary injunction. Those "other supplemental benefit payments" include the amounts which must be paid to those class members affected by the 150 percent gross income test who did not receive timely notice with regard to the change in benefits for February 1982. These amounts must be paid by virtue of the Court's denial of defendants' motion for modification. See Mem. & Order of June 1, 1982 at 10. While defendants concede that there were no valid grounds upon which to appeal the denial of the motion for modification (see Defendants' Reply Brief at 6), they contend that there is a basis for challenge to this Court's original decision concerning the adequacy of the underlying notices. They maintain that the Seventh Circuit is empowered to examine the validity of the underlying notices which prompted this

Court to issue its preliminary injunction on January 14, 1982. Thus, defendants ask the Court to stay all supplemental benefit payments pending the outcome of the appeal. In addition, defendants contend that there would be certain administrative conveniences in staying the supplemental benefit payments until after their appeal is resolved.

The Court cannot accept defendants' arguments. First, as indicated previously in this decision and order, the Court believes that defendants' chances of succeeding on a challenge to this Court's original order finding the challenged notices insufficient are slim at best. Second, other than citing the All Writs Statute (which has nothing to do with this case) and two inapposite Supreme Court decisions, defendants have cited no legal authority to support their

request for a stay. Finally, defendants' assertion that there would be certain administrative burdens avoided by awaiting the Seventh Circuit's resolution of this case do not provide adequate justification for a stay. For these reasons, the Court will deny defendants' request for a stay.

SUMMARY

In summary:

1. The motion to stay this Court's order of June 1, 1982 requiring defendants to pay eligible plaintiffs AFDC benefits for January 1982 at December 1981 benefits is hereby GRANTED. Defendants shall, during the pendency of the appeal, maintain the capability to pay the described benefits should their appeal prove unsuccessful;

2. The motion to stay that portion of the June 1, 1982 order requiring defendants to pay for medical services received by eligible plaintiffs after January 14, 1982 is hereby DENIED; and

3. Defendants' motion to stay all other supplemental payments required by this Court's preliminary injunction is hereby DENIED.

SO ORDERED this 21st day of September 1982, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
ROBERT W. WARREN
UNITED STATES DISTRICT JUDGE

APPENDIX E

United States Court of Appeals 11

For the Seventh Circuit

Chicago, Illinois 60604

October 28, 1982

Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge

GERALDINE BUCKHANON, and ROSETTA BAILEY, et al., Plaintiffs-Appellees, Cross-Appellants.	) Appeals from) the United) States Dist-) rict Court) for the
Nos. 82-2057 and 82-2142 vs.	) Eastern Dist-) rict of) Wisconsin.
DONALD PERCY, BERNARD J. STUMBRAS and KENNETH RENTMEESTER, et al., Defendants-Appellants, Cross-Appellees.	)) No. 81 C 1601) Judge) Robert W.) Warren)

This matter comes before the court for its consideration upon the following documents:

1. "MOTION FOR STAY PENDING APPEAL" filed herein on October 13, 1982, by counsel for the defendants-appellants, cross-appellees.

2. "BRIEF OF APPELLANTS AND CROSS-APPELLEES IN SUPPORT OF MOTION FOR STAY PENDING APPEAL" filed herein on October 14, 1982, by counsel for the defendants-appellants, cross-appellees.

3. "BRIEF OF APPELLEES AND CROSS APPELLANTS IN OPPOSITION TO MOTION FOR STAY PENDING APPEAL" filed herein on October 22, 1982, by counsel for plaintiffs-appellees, cross-appellants.

In light of the fact that the payments required may very well not be recoverable should defendants-appellants, cross-appellees prevail on appeal and in order to accord the State the right to a meaningful appeal,

IT IS ORDERED that the motion seeking a stay of the district court's injunction requiring that MA payments

between January 15, and January 31, 1982 be made at December 1981 MA benefit levels, and of the district court's injunction requiring February AFDC and MA payments to those individuals who did not satisfy the 150% gross income test to be made at December 1981 benefit levels, be GRANTED.

APPENDIX F

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

July 21, 1983

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. _____
Hon. _____

GERALDINE BUCKHANON, and ROSETTA BAILEY, et al., Plaintiffs-Appellees and Cross-Appellants,	Appeals from the United States District Court for the Eastern District of Wisconsin.
No. 82-2057 and No. 82-2142 vs.	No. 81 C 1601
DONALD PERCY, BERNARD J. STUMBRAS and KENNETH RENTMEESTER, et al., Defendants-Appellants and Cross-Appellees.	Judge Robert W. Warren

On consideration of the "MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND REHEARING, EN BANC, INSTANTER; FOR STAY OF THE ISSUANCE OF THE MANDATE PENDING DISPOSITION OF MOTION FOR LEAVE TO FILE SUCH PETITION AND/OR PENDING FILING OF

PETITION FOR WRIT OF CERTIORARI; MOTION TO REINSTATE STAY PENDING DISPOSITION OF MOTION FOR LEAVE TO FILE REHEARING PETITION, AND/OR PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI, AND/OR PENDING ENTRY OF FINAL JUDGMENT IN THE DISTRICT COURT" filed herein on June 9, 1983, by counsel for the defendants-appellants, cross-appellees,

IT IS ORDERED that said motion is hereby GRANTED. The Clerk of this Court shall file herein instanter the 25 tendered copies of defendants-appellants, cross-appellees' petition for rehearing and rehearing en banc.

APPENDIX G

Opinion by Judge Cudahy
JUDGMENT -- ORAL ARGUMENT

United States Court of Appeals 17

For the Seventh Circuit

Chicago, Illinos 60604

May 20, 1983.

Before
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. CALE J. HOLDER, District Judge*

GERALDINE BUCKHANON, and ROSETTA BAILEY, et al., Plaintiffs-Appellees, Cross-Appellants,	)	Appeals from the United States District Court for the Eastern District of Wisconsin.
Nos. 82-2057 and 82-2142 vs.	)	
DONALD PERCY, BERNARD J. STUMBRAS and KENNETH RENTMEESTER, et al., Defendants-Appellants, Cross-Appellees.	)	No. 81-C-1601 Robert W. Warren, Judge

This cause was heard on the record from the United States District Court for

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* The Honorable Cale J. Holder, District Judge for the Southern District of Indiana, is sitting by designation

the Eastern District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED in part, AFFIRMED in part, and MODIFIED in part, and this Court's order of October 28, 1982, is VACATED, in accordance with the opinion of this Court filed this date. Each party is to bear its own costs on appeal.

APPENDIX H

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 9, 1983

Before
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. Cale J. Holder, District Judge*

GERALDINE BUCKHANON and ROSETTA BAILEY, et al., Plaintiff-Appellees and Cross-Appellants,	) Appeals from the United States District Court for the Eastern District of Wisconsin.
No.s. 82-2057 and 82-2142 vs.	) No. 81 C 1601 Robert W. Warren, Judge.
DONALD PERCY, BERNARD J. STUMBRAS and KENNETH RENTMEESTER, et al., Defendants-Appellants and Cross-Appellees.	

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the

*The Honorable Cale J. Holder, District Judge of the Southern District of Indiana, sitting by designation. Judge Holder died suddenly on August 23, 1983, but voted to deny the petition for rehearing on August 1.

above-entitled case, no active member of the court having requested a vote on the suggestion for an en banc rehearing, and the members of the panel having voted to deny said petition for rehearing,

IT IS ORDERED that said petition for rehearing be, and the same is hereby DENIED.

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